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Supreme Court of the United States

OCTOBER TERM 1960

No. 683

RAUL PINTO,

Petitioner,

against

STATES MARINE CORPORATION OF DELAWARE,

Respondent.

GEORGE HOOPER,

Petitioner,

against

TERMINAL STEAMSHIP COMPANY,

Respondent.

GEORGE EZEKIEL,

Petitioner,

against

VOLUSIA STEAMSHIP CO., and SUWANEE STEAMSHIP CO.,

Respondents.

GEORGE RICHTER,

Petitioner,

against

MATHIASEN'S TANKER INDUSTRIES INC., and S.S. MICHAEL J., her engines, hull, tackle, cargo and appurtenances thereof,

Respondents.

BRIEF ON BEHALF OF THE RESPONDENTS VOLUSIA STEAMSHIP CO. AND SUWANEE STEAMSHIP CO. IN OPPOSITION TO THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR M. BOAL
Counsel for Respondents
Volusia Steamship Co. and
Suwanee Steamship Co.

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Statement of Questions Presented by the Petitioner, George Ezekiel

The issues stated in the combined Petition for Writ of Certiorari under the heading of "Questions Presented" have no application to the petition of George Ezekiel. Petitioner's action was litigated upon the question of whether or not goggles had been supplied to him for chipping rust aboard the *M/V Arctic Reefer*. The District Court made a finding of fact adverse to the Petitioner on this issue. The Court of Appeals has affirmed. It is this finding of fact which Petitioner wishes to have reviewed by this Court. Questions as to the nature of the warranty of seaworthiness, notice, or negligent causation do not enter this case in the presence of the District Court's factual findings.

Statement of Facts as to the Petitioner, George Ezekiel

This action, commenced on the Civil side of the District Court and transferred to the Admiralty Docket, was tried in the United States District Court for the Southern District of New York before Judge John W. Holland without a jury. On April 14, 1961 judgment was entered dismissing the complaint (libel). The dismissal was affirmed by the decision of the United States Court of Appeals for the Second Circuit dated December 15, 1961.

The Petitioner, George Ezekiel, a Honduran national, was employed as an A.B. aboard the *M/V Arctic Reefer*, a Liberian flag vessel, earning $108 per month. While the *Arctic Reefer* was lying in Puerto Barrios, Guatemala, the Petitioner was chipping rust above deck and, in some manner, caught a piece of rust in his right eye. He was ashore for treatment of this injury for under two months. The allegation in the petition that Ezekiel was blinded is contrary to fact.

At the time of his injury, the Petitioner apparently did not have his eyes covered by a pair of goggles. The question of why they were not so covered was the principal issue between the parties. It has never been a part of Petitioner's case that the available tools, including goggles, were in any way deficient or defective.

The Respondents' evidence, of which no mention is made in the Petitioner's "Statement of Facts", has been outlined by the Court of Appeals as follows:

> "Defendant introduced the deposition of Bodden, the *Arctic Reefer's* chief officer. His testimony was that each of the seven members of the deck crew, including Ezekiel, had been issued a pair of goggles in March and had been informed that if 'at any time the goggles should be lost or injured it was their duty to report in order for replacement of a new pair'; that a notice was posted to this effect, stating also that replacements were to be obtained from the chief officer; that, pursuant to a written order from the company, he kept six spare sets of goggles in a locker in his office; that it was the custom on the ship for men to come to him for supplies so maintained; but that Ezekiel had never sought a replacement for his goggles. Bodden testified also that, on two previous occasions, one about a month and the other about a week before the injury, he saw Ezekiel chipping rust with goggles around the neck but not on the eyes, and remonstrated about this; Ezekiel promised to be careful on the first occasion and made no answer on the second. After the accident Bodden asked Ezekiel whether he had his goggles on; Ezekiel answered 'No.' Bodden asked why, but got no reply.
>
> In giving judgment for the defendant, Judge Holland found, in an opinion delivered at the close of the trial, 'that goggles for the prevention of injuries to the eye to be used by a crew member in the chipping of rust were a part of the maintenance of the vessel in

question required by the standard of seaworthiness,' 'that in connection with the performance of a chipping of rust operation, seaworthiness requires the making of goggles available to the crew member who is ordered to perform such an operation,' and 'that the evidence in the case demonstrates that both of those duties which I have outlined heretofore as to seaworthiness have been met by the respondent.' The judge declined a request by plaintiff's counsel to consider more detailed findings and conclusions which counsel wished to prepare.

"Reading the findings together as we must, the last quoted finding means at least that the judge had determined, as he was amply warranted in doing, that goggles had been issued to plaintiff, that plaintiff had been instructed to come to the chief officer for a replacement if they were lost or damaged, and that replacements were available."

POINT I

Neither the opinion of the District Court nor the opinion of the Court of Appeals is in conflict with this Court's opinion in *Mitchell* v. *Trawler Racer, Inc.* or the other decisions mentioned in the petition.

A reading of the decisions below will amply demonstrate that both the District Court and the Court of Appeals followed closely this Court's opinion in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539. In fact, it should be apparent from those decisions that it is not a conflict with that decision but a following of it in the Courts below of which the Petitioner complains.

Judge John W. Holland in the District Court cited and then quoted the following portion of this Court's opinion in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 550:

"There is ample room for argument, in the light of history, as to how the law of unseaworthiness should

have or could have developed. Such theories might be made to fill a volume of logic. But, in view of the decisions in this Court over the last 15 years, we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history.

"What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service." 362 U. S. 539, 550.

The occasion for this citation was a *rejection* of *Petitioner's* argument which would incorporate concepts of negligence in the doctrine of seaworthiness. The argument re-appeared before the Court of Appeals and was there answered as follows:

"Even if plaintiff's testimony were to be taken at face value, it did not compel the judge to find that the single alleged misfeasance by the boatswain made him not 'equal in disposition and seamanship to the ordinary men in the calling.' *Keen v. Overseas Tankship Corp.*, 194 F. 2d 515, 518 (2 Cir.), cert. denied, 343 U. S. 966 (1952); *Boudoin v. Lykes Bros. S. S. Co.*, 348 U. S. 336 (1955). The only remaining basis of liability would be the boatswain's alleged action standing by itself. But we have just reaffirmed, without disagreement on that point, that allegedly imprudent action by a seaman's superior is not within the concept of unseaworthiness even though it may be within that of negligence. *Pinto v. States Marine Corporation of Delaware*, ___ F. 2d ___ (2 Cir. 1961), petitions for

rehearing and rehearing *in banc* denied, Nov. 20, 1961, as was held long ago in *The Osceola*, 189 U. S. 158 (1903), and *Chelentis* v. *Luckenbach SS. Co.*, 247 U. S. 372 (1918), and recently in *Imperial Oil, Ltd.* v. *Drlik*, 234 F. 2d 4 (6 Cir. 1956); *Penedo Cia Naviera S. A.* v. *Maniatis*, 262 F. 2d 284 (4 Cir. 1959); and *Lind* v. *American Trading & Production Corp.*, supra; see Gilmore & Black, The Law of Admiralty (1957), 320, and Judge Learned Hand's discussion in *Grillea* v. *United States*, 232 F. 2d 919, 922 (2 Cir. 1956)."

The two opinions below reveal that it was not any failure to divorce the doctrine of seaworthiness from concepts of negligence, nor consideration of transitory conditions that lead to the dismissal. Rather the conclusions of the Courts were founded upon the simple factual basis that the Respondent had supplied and made available to the Petitioner goggles for the performance of his work.

POINT II

No conflict exists in the interpretation of the doctrine of seaworthiness as applicable to the Petitioner Ezekiel.

The joint Petition for a Writ of Certiorari alleges that these four cases raise common questions of the interpretation of the warranty of seaworthiness, but that there is an intra-circuit conflict as to this interpretation. Certainly to the extent that there is a common quesion among these cases the decisions present no conflict. Petitioners make no citations of other cases which might be in conflict either within or without the Second Circuit. Their sole basis for the application for a writ is the dissent voiced in two of the cases, in one instance by Judge Clark and in the other by Judges Smith and Clark. We do not believe that this Court wishes to grant a review of all cases in which a dissent is noted below and most particularly when

such dissent is premised upon a disagreement as to a factual conclusion. It seems apparent that in the case of Petitioner Ezekiel, Judge Clark dissented primarily because he would have reached a different conclusion than the trial judge or the majority of the Circuit Court upon the primary question of whether or not a Respondent had supplied the Petitioner with goggles.

The petition for a Writ of Certiorari should therefore be denied.

CONCLUSION

The Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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Volusia Steamship Co., and
Suwanee Steamship Co.